

United States District Court
Eastern District of California

James Michael Munro,
Petitioner,

vs.

Rosanne Campbell, Warden,
Respondent.

No. Civ. S 02-1974 FCD PAN P
Findings and Recommendations

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Petitioner, a state prisoner without counsel, challenges the
procedures used in a September 2000 parole suitability hearing.

See 28 U.S.C. § 2254. Respondent¹ moves to dismiss upon the
grounds petitioner failed to exhaust available state remedies and
the petition is untimely. Petitioner opposes.

September 13, 2000, the Board of Prison Terms (BPT) found
petitioner unsuitable for parole. Petitioner filed an
administrative appeal and February 14, 2001, the BPT's decision
was affirmed. Petitioner sought habeas relief in the Amador

¹ Rosanne Campbell is substituted as respondent. See Rule 2(a), Rules
Governing § 2254 Proceedings; Fed. R. Civ. P. 25(d).

1 County Superior Court, which denied relief July 2, 2002, upon the
2 ground the petition was untimely and petitioner failed to justify
3 the delay. Petitioner filed a civil rights complaint in this
4 court September 10, 2002, which the court ultimately construed as
5 one for habeas corpus relief.

6 A one-year limitation period for seeking federal habeas
7 relief applies to prisoners "in custody pursuant to the judgment
8 of a state court," including challenges to administrative
9 decisions to deny parole. 28 U.S.C. § 2244(d)(1); see Shelby v.
10 Bartlett, 391 F.3d 1061 (9th Cir. 2004) (§ 2244(d) applies to
11 state prison administrative disciplinary decisions); see also
12 Redd v. McGrath, 343 F.3d 1077, 1080 n. 4 (9th Cir. 2003)
13 (assuming one-year limitation period applies to parole board
14 determination). When a California prisoner challenges a decision
15 of the BPT, the limitation period begins to run from the date on
16 which the factual predicate of a claim could have been discovered
17 through the exercise of due diligence, viz., the day after a
18 prisoner receives notice of the denial of his administrative
19 appeal of the BPT's decision. 28 U.S.C. § 2244(d)(1)(D); Shelby,
20 391 F.3d at 1066; Redd, 343 F.3d at 1082. A properly filed state
21 post conviction application tolls the limitation period. 28
22 U.S.C. § 2244(d)(2). A state court application is "properly
23 filed" when it satisfies the state's conditions to filing. Artuz
24 v. Bennet, 531 U.S. 4, 11 (2000) (state procedural bars are not
25 "conditions to filing" but rather are "conditions to obtaining
26 relief"). A state's time limits for seeking post-conviction

1 relief are conditions to filing and so when a state court denied
2 post conviction relief upon the ground of untimeliness, the
3 application was not "properly filed," and is not a basis for
4 statutory tolling. Pace v. DiGugliemo, 2005 W.L. 957194 (U.S.).

5 It is not clear when, exactly, the February 14, 2001, BPT
6 decision became final but that does not matter because petitioner
7 filed nothing that could be construed as a federal habeas
8 petition until September 10, 2002, almost 19 months later and he
9 is not entitled to statutory tolling while any "properly filed"
10 state habeas proceeding was pending because the state court found
11 his attempt to seek relief in the state court was untimely and,
12 therefore, not "properly filed."

13 The federal petition is untimely. Accordingly, respondent's
14 November 29, 2004, motion should be granted and this action
15 should be dismissed as untimely.

16 Pursuant to the provisions of 28 U.S.C. § 636(b)(1), these
17 findings and recommendations are submitted to the United States
18 District Judge assigned to this case. Written objections may be
19 filed within 20 days of service of these findings and
20 recommendations. The document should be captioned "Objections to
21 Magistrate Judge's Findings and Recommendations." The district
22 judge may accept, reject, or modify these findings and
23 recommendations in whole or in part.

24 Dated: June 7, 2005.

25 /s/ Peter A. Nowinski
PETER A. NOWINSKI
26 Magistrate Judge